

No. 22-4544

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRENT BREWBAKER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
Honorable Louise Wood Flanagan
District Court No. 5:20-cr-00481-FL-1

**MOTION OF THE UNITED STATES OF AMERICA FOR EXTENSION OF
TIME TO FILE PETITION FOR REHEARING AND FOR
REHEARING EN BANC**

Appellee United States of America, through its undersigned counsel,
respectfully moves the Court, pursuant to Federal Rules of Appellate Procedure
26(b) and 27(d), to extend the time for the filing of any government petition
seeking panel rehearing and rehearing en banc to and including **January 16, 2024**.

On December 1, 2023, the Court issued a published opinion in this appeal.
Dkt. 56. The Court affirmed Defendant Brent Brewbaker's convictions for mail
fraud, wire fraud, and conspiracy to commit mail and wire fraud, but reversed his
conviction under Section 1 of the Sherman Act, 15 U.S.C. § 1. *Id.* at 2, 33. Under
Federal Rules of Appellate Procedure 35(c) and 40(a)(1), any petition for panel

rehearing or rehearing en banc must be filed within 14 days after entry of judgment. Appellee's deadline to file a petition is therefore December 15, 2023.

The published panel opinion addresses issues of exceptional importance to the criminal enforcement of the antitrust laws—specifically, the types of restraints that are subject to per se condemnation under Section 1 of the Sherman Act. Because of the decision's ramifications, the government has a strong interest in respectfully considering the panel's opinion and determining whether to seek panel rehearing and rehearing en banc.

Any decision by the United States to file a petition seeking rehearing en banc must be authorized by the Solicitor General of the United States. 28 C.F.R. § 0.20(b) (Solicitor General “[d]etermin[es] whether, and to what extent, appeals will be taken by the Government to all appellate courts (including petitions for rehearing *en banc* . . .)”). That authorization can take place only after comprehensive review by officials in the Solicitor General's office, as well as other lawyers in the Department of Justice. Given the need for multiple layers of thorough review, the government respectfully requests that the filing deadline for a petition for panel rehearing and rehearing en banc be extended by 32 days from the current deadline (since 30 days would fall on a Sunday and 31 days would fall on a federal holiday, Martin Luther King, Jr. Day). This extension will allow the

government to fully and robustly consider whether to seek rehearing without causing undue delay in the disposition of this appeal.¹

Brewbaker will not be prejudiced by this extension because he has already been released from incarceration and because any petition for panel or en banc rehearing will not affect Brewbaker's convictions on the five counts that the panel's opinion upheld.

Pursuant to Fourth Circuit Rule 27(a), the government informed Brewbaker's counsel of its intent to file this motion. As of the time of filing, Brewbaker's counsel had not provided his position on the motion but stated that he would attempt to do so by Monday, December 4. Once the government has learned Brewbaker's position, the government will inform the Court.

WHEREFORE, the United States respectfully requests that the Court grant an extension of 32 days from the current deadline to file any petition for panel rehearing and rehearing en banc, up to and including January 16, 2024.

¹ The government recognizes that this Court "strictly enforces the time limits for filing petitions for rehearing and petitions for rehearing en banc," 4th Cir. L.R. 40(c), but believes that this case, like previous criminal cases in which the government has requested additional time to consider whether to seek rehearing, warrants such relief. *See, e.g.,* Order, *United States v. Aigbekaen* (4th Cir. Nov. 22, 2019) (No. 17-4109), ECF No. 230; Order, *United States v. Giddins* (4th Cir. June 16, 2017) (No. 15-4039), ECF No. 72; Order, *United States v. Graham* (4th Cir. Aug. 10, 2015) (No. 12-4659), ECF No. 178.

RESPECTFULLY SUBMITTED this 1st day of December, 2023.

/s/ Peter M. Bozzo

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limit of Fed. R. App. P. 27(d)(2) because, excluding the parts exempted by Fed. R. App. P. 32(f), the motion contains 614 words.

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in Microsoft Word 2019 using Times New Roman font, a proportionally spaced typeface.

December 1, 2023

/s/ Peter M. Bozzo

PETER M. BOZZO
Counsel for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2023, I caused the foregoing to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all registered users, including counsel for Brent Brewbaker.

December 1, 2023

/s/ Peter M. Bozzo

PETER M. BOZZO

Counsel for the United States of America